



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: ACC Construction Co., Inc.

File: B-277554

Date: September 22, 1997

Karl Dix, Jr., Esq., Smith, Currie & Hancock, for the protester.
D. Lee Roberts, Jr., Esq., Long, Weinberg, Ansley & Wheeler, for Dawson Building Contractors, Inc., an intervenor.
William A. Hough, Esq., Department of the Army, for the agency.
Wm. David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly rejected low bid as nonresponsive where bidder failed to acknowledge with its bid a material amendment to an invitation for bids that substantially increased the bidder's performance obligations for construction of a parking area and resolved an ambiguity as to the dimensions required for construction of a vehicle washrack.

DECISION

ACC Construction Co., Inc. protests the rejection of its low bid under a Department of the Army invitation for bids (IFB) No. DACA21-97-B-0012, issued for construction work at the United States Army Reserve Center, Ft. Bragg, North Carolina. ACC's bid was rejected as nonresponsive because it did not contain an acknowledgment of amendment No. 0005, which the agency considered material. ACC contends that the amendment was not material and that the failure to acknowledge it should be waived as a minor informality.

We deny the protest.

The IFB was issued on March 13, 1997. Bids were opened on May 13. ACC's low bid of \$10,158,401 was rejected after it was found not to contain an acknowledgment of amendment No. 0005. The agency considered the amendment to be material in view of its effect on the legal obligations of the contracting parties and the estimated \$155,614 in additional costs associated with the revisions contained in the amendment.

Amendment No. 0005 basically addressed four areas of work. First, under the IFB, bidders were to offer the agency the option of a gravel or a paved military equipment parking area. Drawing C10 of the IFB showed a requirement of 9 inches of aggregate base with a 3-inch layer of bituminous surface for the paved parking area. However, the drawing contained no specifications showing the base and surface of the gravel parking area, should the agency decide to procure the gravel parking area. Drawing C10 was revised by amendment No. 0005 to include a diagram specifying 8 inches of gravel. Second, under original drawing C3 the measurements for the vehicle washrack in the parking area were shown to be 25 feet by 38 feet, but in original drawing C17, the same area was specified as 45 feet by 70 feet. The amendment corrected this discrepancy by conforming the measurements in drawing C3 to 45 feet by 70 feet. Third, the original IFB contained a kitchen equipment schedule listing 38 items. For most of items 1 through 25, the agency provided the pertinent information needed to bid the items (there were no items numbered 26 or 27). However, for items 28 through 40, the IFB stated that the government was awaiting more detailed information. Amendment No. 0005 supplied this information on items 28 through 40 (and deleted two items). The amendment also added information designating acceptable brands/models for some of items 1 through 25 and added five new required items (42 through 46). Fourth, a rock dam and silt fencing were added to the environmental protection requirements established under the original IFB.¹

ACC contends that amendment No. 0005 only clarified requirements that were already contained in the IFB and did not affect the legal obligations of the contracting parties. Also, ACC argues that the agency overstated the amendment's cost impact.

Federal Acquisition Regulation § 14.405 permits the contracting officer to waive, or allow a bidder to cure, a minor informality or irregularity in a bid, including the failure to acknowledge an amendment which has no, or merely a negligible, effect on the price, quality, or quantity of the goods or services being procured. There is no precise rule for determining what is negligible, Innovative Refrigeration Concepts, B-271072, June 12, 1996, 96-1 CPD ¶ 277 at 2; rather, that determination is based on the facts of each case. Day and Night Janitorial and Maid and Other Servs., Inc., B-240881, Jan. 2, 1991, 91-1 CPD ¶ 1 at 4. Where an amendment has more than a negligible impact on the price, quantity, quality, or delivery of the items or services bid upon or on the bidder's legal obligation to perform in accordance with the IFB, it is material and the failure to acknowledge the amendment must result in the rejection of the bid as nonresponsive since, absent an acknowledgment,

¹The agency estimated the increased costs of the four changes as follows: \$83,400 for the gravel work; \$12,906 for the washrack; \$39,222 for the kitchen schedule (\$35,427 for items 28 through 46 and \$3,795 for items 1 through 25); and \$6,980 for the dam and fencing.

the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. DeRalco, Inc., B-232989, Dec. 8, 1988, 88-2 CPD ¶ 574 at 2.

Here, we agree with the agency that amendment No. 0005 to the IFB was material, since it affected contract performance in at least two areas. As a result, ACC's failure to acknowledge these portions of the amendment could not be waived. See Kentucky Bldg. Maintenance, Inc., B-215397, Dec. 19, 1984, 84-2 CPD ¶ 683 at 4. More specifically, we conclude that the amendment imposed new obligations on the contractor in constructing the gravel parking area and clarified a significant ambiguity concerning the size of the vehicle washrack to be built.

As stated above, the unamended IFB provided for a gravel parking area. Section 02.24.1 at paragraph 3.4.4 of the solicitation specifications, entitled "layer thickness," provided that "[c]ompacted thickness of the aggregate shall be as indicated. No layer shall be in excess of 8 inches, nor less than 3 inches in compacted thickness." However, the applicable drawing C10 only addressed the aggregate thickness of the paved parking area. The drawing failed to show the aggregate thickness for the gravel parking area. Amendment No. 0005 revised drawing C10 to provide a diagram showing that the compacted thickness for the gravel parking area was required to be 8 inches. Absent this amendment, bidders could furnish an aggregate thickness of only 3 inches. The amendment thus required the contractor to provide an additional 5 inches of aggregate that it was not contractually bound to provide under the original IFB. Further, the record shows that the requirement for an 8-inch depth was material, since it affects the quality of the work and the performance of the parking area, which is to be used for parking military equipment and vehicles.² Since amendment No. 0005 imposes a new legal obligation on the bidder, the amendment is material, and whether the agency's cost estimate for the additional 5-inch aggregate is overstated (as the protester asserts) is not controlling. See DeRalco, Inc., *supra*, at 3.³

²The protester argues that, given the use of the area as a military equipment parking lot, the agency is unreasonable in asserting that a bidder would have thought a 3-inch aggregate was acceptable. This argument misses the point, which is that the unamended IFB only obligated contractors to provide a 3-inch thickness for the gravel area. In fact, the protester's argument that a 3-inch depth would not have satisfied the agency's needs effectively concedes the materiality of the amendment.

³ACC argues that on both the original and amended drawing C3 (site layout) the parking area was designated by the marking shown in the legend as "Heavy Duty Pavement." Another different marking was shown on the legend for "Gravel Base Bid" and "Heavy Duty Paving M.E.P. Option" (both of which referenced drawing C10 for further details), but this marking was not shown anywhere on the site layout
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Finally, the protester's argument that the requirement for the gravel parking area should be waived because the agency intends to procure a paved parking area is without merit. The IFB called for bidders to submit prices for both a gravel and a paved parking area; the agency, based on funds available, intended to choose between these two options. The agency confirms that the gravel parking area was and continues to be a legitimate option along with the paved parking area option. In any event, the responsiveness of the bid must be judged at the time of bid opening. The agency's ultimate decision after bid opening as to which option to exercise does not affect the bid's responsiveness at the time of bid opening.

We also think the agency correctly found the amendment of drawing C3 addressing the size of the vehicle washrack to be material. This revision resolved the conflict between the unamended drawing C3, which showed a smaller size washrack (25 feet by 38 feet), and drawing C17, which showed the correct and substantially larger dimensions of the washrack (45 feet by 70 feet). Absent the amendment, the IFB was ambiguous concerning the dimensions of the washrack.

A procuring agency is not required to enter into a contract which presents the potential for litigation stemming from an ambiguity in a solicitation. Air Quality Experts, Inc., B-256444, June 15, 1994, 94-1 CPD ¶ 374 at 2. Rather, an agency has an affirmative obligation to avoid potential litigation by resolving solicitation ambiguities prior to bid opening. Amendments clarifying matters which could otherwise engender disputes during contract performance are generally material and must be acknowledged. Id.

Here, it is clear that the agency had a legitimate basis for its concern that the inconsistency between the drawings could result in the submission of bids based on inaccurate data and, subsequently, form the basis for a dispute between the parties. See, e.g., Sommers Bldg. Co., Inc., ASBCA No. 32232, 86-3 BCA ¶ 19,223 (1986) (dispute between agency and contractor based on inconsistent specifications). In the absence of the amendment, the winning contractor ultimately could have argued that it was entitled to a price increase because the washrack drawings conflicted as to the size of the washrack. Thus, the amendment did more than clarify the

³(...continued)

(drawing C3). This "discrepancy" constitutes an ambiguity, ACC argues, which requires that the IFB be canceled and that the procurement be resolicited after correction of the discrepancy. We disagree and note that ACC, from its protest submissions, clearly understood that the IFB required pricing for a gravel and a paved military equipment parking area that was located on the site layout and marked as "Heavy Duty Pavement." In any event, this "discrepancy" was clearly apparent prior to bid opening, and ACC's raising of the issue after bid opening is untimely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1997).

agency's requirement--it removed an ambiguity which significantly affected the dimensions of the washrack, since under one of the original drawings the washrack was much smaller than what the agency intended. Accordingly, the amendment was material and the agency properly rejected ACC's bid for failure to acknowledge a material amendment.⁴

The protest is denied.

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⁴In view of the discussion above, we need not address the materiality of the remainder of the amendment.